183

No. 10-736

Supreme Court, U.S.
FILED
MAR 11 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ADHAM MOHAMMED ALI AWAD,

Petitioner,

v.

BARACK H. OBAMA, DAVID M. THOMAS, JR., TOM COPEMAN, and ROBERT M. GATES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

Diana M. Rutowski
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, California 94025
650-614-7400

John L. Ewald
Counsel of Record
Daniel J. Thomasch
Richard W. Mark
Glenn K. Jones
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, New York 10019
212-506-5000
jewald@orrick.com

Counsel for Petitioner

March 11, 2011

TABLE OF CONTENTS

Page

INTRODUCTION 1

I. THE GOVERNMENT AVOIDS CONFRONTING THE QUESTION PRESENTED BY MISSTATING AWAD'S ARGUMENTS 3

II. THE SUPPOSED "SAFEGUARDS" RELATING TO THE GOVERNMENT'S INDISCRMINATE USE OF HEARSAY OFFER LITTLE, IF ANY, PROTECTIONS TO THE DETAINEES 6

III. THE D.C. CIRCUIT'S ADOPTION OF THE PREPONDERANCE STANDARD FOR ALL GUANTANAMO CASES CONFLICTS WITH THIS COURT'S PRECEDENT 8

IV THERE HAS BEEN NO WAIVER 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

Cases

Al-Bihani v. Obama,
590 F.3d 866 (D.C. Cir. 2010), *en banc denied*, 619 F.3d 1 (D.C. Cir. 2010), *petition for cert. filed*, 10-7814 (U.S. Nov. 29, 2010) 3

Al Odah v. United States,
611 F.3d 8 (D.C. Cir. 2010), *petition for cert. filed*, 10-439 (U.S. Sept. 28, 2010) 3

Boumediene v. Bush,
553 U.S. 723 (2008) 1, 6, 8, 9

Hamdi v. Rumsfeld,
542 U.S. 507 (2004) 5, 9

Michigan v. Bryant,
No. 09-150, --S. Ct. --, 2011 WL 676964 (Feb. 28, 2011) 8

Yee v. City of Escondido,
503 U.S. 519 (1992) 11

Rules

Fed. R. Evid. 803(8) 7

Miscellaneous

Brief for Appellant, *Awad v. Obama*, No. 09-5351 (D.C. Cir. Mar. 19, 2010) 10

Brief for the Respondents in Opposition, *Kiyemba v. Obama*, No. 10-775 (U.S. Feb. 9, 2011) 2

Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029 (2007)..... 10

INTRODUCTION

The Petition and Opposition together demonstrate that this Court should grant certiorari to review the United States Court of Appeals for the District of Columbia Circuit's decision here.

Awad's Petition squarely presents a crucial question of national significance. In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Court left open this issue: What are the appropriate procedural standards for the Guantanamo habeas cases? The Government does not dispute that the Petition presents that very question. And while Guantanamo-related cert. petitions raise many important issues, resolving *this* procedural standards question will directly impact *all* of the pending Guantanamo cases, as well as future executive detention cases.

Awad's case is the ideal vehicle for considering that important question, and the Government does not challenge that. The D.C. Circuit directly and explicitly ruled on the evidentiary standard and the standard of proof, and the evidence in this case is typical of the evidence used in the Guantanamo proceedings. Here, where the district court found that the Government's "gossamer thin" case barely met the preponderance standard (16a[1]), the procedural standards used made all the difference in the outcome.

---

[1] Citations to "__a" are to the full unclassified version of the district court opinion attached to the Brief for the Respondents in Opposition ("Opp.")

There is no need for the issue to develop further in the D.C. Circuit, and the Government does not resist the Petition on that basis. The D.C Circuit has clearly stated its position on the appropriate procedural rules, and has reaffirmed adherence to that position in case after case.

The Petition shows that the D.C. Circuit erred in granting all Guantanamo detainees only the most minimal of procedural protections. The Government's defense of the D.C. Circuit's decision does not confront the Petition's central argument. Boiled down to its essence, the Government argues that the procedural rules adopted by the D.C. Circuit are appropriate because those are the only ones that the Government can satisfy. Such a results-oriented approach has no basis in this Court's precedent.

The Government argues against issuing the writ because it believes the D.C. Circuit reached the right result in Awad's particular case. That is no reason to decline review of a squarely-presented, difficult, and important question of executive power and national security. No matter what this Court would conclude on the merits, certiorari should be granted to provide much-needed guidance to the lower courts and the political branches.

The impact of the D.C. Circuit's procedural regime cannot be overstated. The Government misleadingly portrays Guantanamo detainees as far "ahead" based on a district court "win-loss" record of 38-21 Opp. 6. Seventeen of those habeas grants, however, involve petitions by Uighurs whose detention the Government did not defend. *See* Brief for the Respondents in Opposition at 3-4, *Kiyemba v.*

Obama, No. 10-775 (U.S. Feb. 9, 2011). More importantly, since the D.C. Circuit first announced its Guantanamo procedural rules in *Al-Bihani v. Obama*,[2] the scales have tipped dramatically in the Government's favor, with the Government twice as likely to prevail in the district court. The disparity reaches its apex in the D.C. Circuit, which to this day, still has not granted a single Guantanamo habeas petition.

Awad, like many other detainees, has been imprisoned at Guantanamo for more than nine years with no end in sight. It is time for this Court to answer the question expressly left open in *Boumediene*.

I. THE GOVERNMENT AVOIDS CONFRONTING THE QUESTION PRESENTED BY MISSTATING AWAD'S ARGUMENTS

The Government's Opposition exaggerates Awad's arguments and ignores the actual question presented by the Petition until the final pages of its brief. Setting aside the case-specific facts, the Government's Opposition is virtually a carbon copy of the brief it submitted in opposition to the petition filed in *Al Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010), *petition for cert. filed*, 10-439 (U.S. Sept. 28, 2010). According to the Government, the

---

[2] 590 F.3d 866 (D.C. Cir. 2010), *en banc denied*, 619 F.3d 1 (D.C. Cir. 2010), *petition for cert. filed*, 10-7814 (U.S. Nov. 29, 2010).

question presented by this Petition is "essentially identical" to that presented in *Al Odah*. Opp. 6.

The Government is wrong. While the two petitions raise related issues with some overlap between them, they are not "essentially identical." The *Al Odah* petition argues for the application of the Federal Rules of Evidence to the Guantanamo habeas cases and that a clear and convincing standard should apply to all such cases. This Petition, however, argues that the D.C. Circuit's blanket procedural rules for all Guantanamo cases are unconstitutional because they do not take into account the risk of erroneous deprivation of liberty in the detainee's particular case. The D.C. Circuit's minimal procedural protections are insufficient in cases, such as this one, where the detainee is not captured on a battlefield engaged in armed conflict. In such cases, where the detainee is at greater risk of misclassification, the courts should provide increased procedural protections. The Government completely dodges this fundamental point because it is not reasonably disputable.

Because of the overlap in issues, the Court may wish to consider granting both the *Al-Odah* and *Awad* petitions. Alternatively, if the Court grants certiorari in one of the cases, it should hold the other pending disposition of the granted case.

The Government buries its criticism of sliding-scale procedural rules on the penultimate page of the Opposition. The Government worries that this standard would "entail duplicative preliminary litigation." Opp. 18. That overstates the complexity of the proposed rule. Typically, it will not be difficult

to determine whether an individual was captured on the battlefield engaged in armed conflict. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 522 n.1 (2004) (plurality) (Hamdi "was carrying a weapon against American troops on a foreign battlefield").

The facts of this case make it most suitable for considering the procedural standards question. In particular, the Government is wrong to describe Awad as captured while engaged in armed conflict. The undisputed factual record on that issue shows the opposite to be the case. When captured, Awad was unarmed and the Government has never alleged that he undertook a single act of aggression against United States or affiliated forces. 12a. The district court found that Awad arrived at the civilian hospital before the al Qaeda fighters overtook it. 13a & n.8. When the al Qaeda fighters did arrive, Awad had just endured the amputation of a significant part of his leg. 12a. Yet, through an unreasonable inference, the district court found that "gossamer thin" evidence was enough to make it more likely than not that Awad chose that time—in his hospital bed—to join al Qaeda. *See* 16a.

Instead of responding to the issues presented by the Petition, the Government spends much of the Opposition responding to caricatures of arguments not made by Awad and to those advanced in the *Al Odah* petition. While recognizing that these habeas proceedings "are flexible and may be adapted to circumstances as necessary" (Opp. 8), the Government advocates a procedural straitjacket for every Guantanamo case, regardless of circumstance. Furthermore, by splitting Awad's question presented into two separate questions, the Government

violates a bedrock principle of habeas law. This Court could not have been clearer in *Boumediene*: In determining whether habeas procedures are sufficient, "[w]hat matters is the *sum total of procedural protections* afforded to the detainee . . . ." *Boumediene*, 553 U.S. at 783 (2008) (emphasis added). The question of whether the evidentiary rules adopted by the D.C. Circuit are appropriate cannot be reviewed in isolation, and the same is true for the standard of proof. The two are inextricably intertwined. Either procedural rule could seem sensible considered in isolation, but when they are paired together in a case with a high risk of erroneous deprivation, the D.C. Circuit's procedural rules do not offer detainees a "meaningful opportunity" to challenge their detention.

II. THE SUPPOSED "SAFEGUARDS" RELATING TO THE GOVERNMENT'S INDISCRMINATE USE OF HEARSAY OFFER LITTLE, IF ANY, PROTECTIONS TO THE DETAINEES

The very first sentence of the Government's Argument section is a patent overstatement—Awad nowhere argues that "district courts should not consider hearsay evidence" (Opp. 6) in Guantanamo cases. Awad accepts that hearsay may be used (*see, e.g.*, Pet. 28), but objects to the wholesale admission of all hearsay, to the total elimination of any right to confrontation, and to reliability determinations that are made in a circular fashion. To justify prolonged, indefinite detention—particularly where the standard is a mere preponderance of the evidence—the Government should have to offer at least a single piece of evidence that itself is reliable, i.e., a solid

foundation to indefinitely deprive an individual of his liberty.[3]

The Government defends the wholesale use of hearsay because detainees have a "safeguard[ ] concerning the use of hearsay evidence," namely their counsel's "opportunity to contest the reliability of particular pieces of evidence." Opp. 11. That is a safeguard in name only.[4] *See, e.g.*, Pet. 29-33. First, one cannot cross-examine a piece of paper that contains unsworn, inchoate, double- and triple-hearsay statements. Second, this case demonstrates the futility of contesting the reliability of a particular piece of evidence because the D.C. Circuit's rule allows the Government to establish reliability by using other presumptively unreliable documents. Awad successfully argued to the district court that the Tarnak Farms list was unreliable evidence because the court could not determine the

---

[3] The "intelligence reports that form the core evidentiary basis for most of the Guantanamo habeas cases" (Opp 8) are not the type of official public records that fall within hearsay exception 803(8) of the Federal Rules of Evidence The Government does not take issue with the statement in the Petition that most of the intelligence reports offered are unfinished and are merely the first step in an intelligence cycle that is supposed to end with reliability assessments made by intelligence analysts *See* Pet 31.

[4] Similarly, the assertion that detainees have "the opportunity to make additional requests for specific discovery" is another illusory "safeguard " Opp 12 Here, every single discovery request made by Awad was opposed by the Government and denied by the district court 2a. Successfully obtaining discovery from the Government in the Guantanamo habeas cases is the rare exception.

significance of the names appearing on the list. 9a-10a, 14a. Yet, incredibly, the district court later used that admittedly unreliable document as a linchpin of its decision. *See* 14a-15a. Regardless, a watered-down reliability restriction offers little protection to the detainees. *See Michigan v. Bryant*, No. 09-150, -- S. Ct. --, 2011 WL 676964, at *29 (Feb. 28, 2011) (Scalia, J., dissenting) ("Not even the least dangerous branch can be trusted to assess the reliability of uncross-examined testimony in . . . trials implicating threats to national security.").

III. THE D.C. CIRCUIT'S ADOPTION OF THE PREPONDERANCE STANDARD FOR ALL GUANTANAMO CASES CONFLICTS WITH THIS COURT'S PRECEDENT

In rejecting the argument that the appropriate standard in this case is clear and convincing evidence, the D.C. Circuit failed to support its conclusion and the Government offers little more in its Opposition. The Government offers three justifications for the preponderance standard (Opp. 16-17), none compelling.

First, the Government asserts that the clear and convincing standard has no "historical support." Opp. 17. In a sense the Government is correct, but that is only because what the Government is seeking to do here—indefinite, prolonged detention solely on the basis of executive order—is unprecedented. *See Boumediene*, 553 U.S. at 770-71 ("[T]he cases before us lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from

September 11, 2001, to the present, is already among the longest wars in American history."). The Government cites no case in which this Court upheld prolonged detention with anything less than clear and convincing evidence as the standard of proof. The consistent precedent from this Court is all contrary to the Government's position. *See* Pet. 19.

Second, the Government contends that a clear and convincing standard would be inconsistent with the preponderance standard set forth in Army Regulation 190-8, which applies to military tribunals under Article 5 of the Geneva Conventions. Opp. 17. The comparison is inapt. Article 5 tribunals are not constituted to determine whether prisoners should be indefinitely detained; rather, they are expedited hearings to determine whether a prisoner is entitled to the protections of the Geneva Conventions.

Third, the Government argues that a clear and convincing standard is inappropriate because it would typically be unable to satisfy such a standard. Opp. 17. The Government exaggerates the burden such a standard would impose on it. Awad is only seeking application of the intermediate standard of proof, not the criminal beyond a reasonable doubt standard, in a subset of the Guantanamo cases. In the recent executive power cases, this Court recognized that the Government overstated the difficulties it would encounter if put to a certain procedural burden. *See, e.g.*, *Boumediene*, 553 U.S. at 769 ("The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims."); *Hamdi*, 542 U.S. at 534 ("We think it unlikely that th[e]

basic process [in the enemy-combatant proceedings] will have the dire impact on the central functions of warmaking that the Government forecasts."). The Court should proceed with the same healthy skepticism in this case.

While the law review article upon which the Government relies (Opp. 17) reaches the tepid conclusion that a preponderance of the evidence standard in the Guantanamo cases is "acceptable," it also notes that authorizing indefinite detention on the basis of that standard is "not untroubling" and "given the normative pull of the criminal law baseline, it remains unsettling to uphold detention when it is only barely more likely than not that the citizen is an enemy combatant." Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2092 (2007). This is a difficult and grave question of law that this Court should resolve without delay.

IV. THERE HAS BEEN NO WAIVER

The Government asserts in passing (Opp. 18) that Awad waived his argument that the appropriate procedural rules depend upon the circumstances of the case. There is no waiver. Awad argued in the D.C. Circuit that the procedures adopted by the district court in this case violated the Constitution, particularly the wholesale admission of hearsay paired with the minimal preponderance of the evidence burden. *See, e.g.*, Brief for Appellant at 52-53, *Awad v. Obama*, No. 09-5351 (D.C. Cir. Mar. 19, 2010). The D.C. Circuit rejected that argument, reaffirming its statement in *Al-Bihani* that the same

procedural standards apply to all Guantanamo cases, regardless of the circumstances of the case. App. 20-21. To the extent that Awad has expanded on the reasoning behind his argument in the Petition and modified the question slightly to account for that reasoning, he is free to do so. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Diana M. Rutowski
Orrick, Herrington & Sutcliffe LLP
1000 Marsh Road
Menlo Park, CA 94025
(650) 614-7400

John L. Ewald
Counsel of Record
Daniel J. Thomasch
Richard W. Mark
Glenn K. Jones
Orrick, Herrington & Sutcliffe LLP
51 W. 52nd Street
New York, NY 10019
(212) 506-5000
jewald@orrick.com

Counsel for Petitioner